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October 7 1998

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Magalie Roman Salas
Secretary
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1919 M St., N.W.
Washington, D.C. 20554

OCT - 7 1998

**Re: Petition of U S WEST Communications, Inc. for
Forbearance from Regulation as a Dominant Carrier in
the Phoenix, Arizona MSA, CC Docket No. 98-157**

Dear Ms. Salas:

Attached for filing in the referenced docket, pursuant to the procedural order in this proceeding, FCC 98-1712 (released August 28, 1998), on behalf of Qwest Communications Corporation ("Qwest"), are the original and nine copies of Qwest's comments.

We have also forwarded a copy of the opposition to Jane Jackson, Chief, Competitive Pricing Division, Common Carrier Bureau and to International Transcription Services.

If you have any questions, please contact me.

Respectfully submitted,



Linda L. Oliver
Counsel for Qwest Communications
Corporation

Enclosures

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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OCT - 7 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of

Petition of U S WEST Communications,
Inc. for Forbearance from Regulation as
a Dominant Carrier in the Phoenix,
Arizona MSA

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CC Docket No. 98-157

OPPOSITION OF QWEST COMMUNICATIONS CORPORATION

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SUMMARY

In seeking forbearance from the Commission's already minimal regulatory requirements, U S WEST relies on the fact that it now faces a measure of competition for its high capacity services in the Phoenix MSA. However, U S WEST ignores the fact that it has a virtual monopoly for all other services, and it does not even attempt to show compliance with the local market-opening provisions of the 1996 Telecommunications Act. U S WEST also remains the monopoly facilities provider for many customers and for many geographic areas within the Phoenix MSA. U S WEST acknowledges that its competitors cannot provide ubiquitous high capacity services, and that many customers (and potential customers) of high capacity services remain outside the reach of any competitive service provider. It also recognizes that many millions of dollars would have to be invested to reach those customers. In sum, the market forces U S WEST faces simply are not sufficient to justify blanket deregulation of its high capacity services.

U S WEST has failed to satisfy any of the three prongs of the statutory forbearance test set forth in Section 10 of the Act, 47 U.S.C. § 160(a). First, continued regulation is necessary to ensure that rates, terms and conditions are just, reasonable, and not unreasonably discriminatory. Without tariffs, customers will not be able to detect unreasonable or discriminatory pricing, and will not even know what services are available. If permitted to remove high capacity services from price caps and/or to deaverage rates, U S WEST also could discriminate

against customers in other areas where there are no competitive alternatives by raising rates in those areas higher than would otherwise be possible under the Commission's zone density pricing rules.

U S WEST also fails to meet the second prong of the test, because consumers would be harmed without the protection of tariffs and price cap rules. In the absence of tariffs, for example, U S WEST could offer better rates to favored customers, offer discounts tied to whether a customer selects U S WEST as its local provider, and offer itself lower rates if and when it receives interLATA authority, without detection. Rates in less competitive areas also could rise if U S WEST removes Phoenix high capacity services from price cap regulation.

Forbearance also would be inconsistent with the public interest, the third prong of the test. In addition to the consumer and competitive problems already outlined, forbearance would foreclose the Commission from fully considering the issues raised by this petition, which affect the entire telecommunications industry nationwide.

For example, in its price cap and access charge rules, the Commission has already balanced its interest in protecting consumers and promoting competition, on the one hand, with its interest in providing pricing flexibility as competition develops, on the other. The Commission is now considering whether and under what conditions to grant further pricing flexibility, recognizing the need for vigorous local competition as the prerequisite for such added flexibility.

The Commission also is considering many complex issues related to provision of high-bandwidth advanced services in its Section 706 inquiry and rulemaking. Many of the services at issue there -- xDSL, for example, which U S WEST is offering in the Phoenix MSA -- would fall within the definition of "high capacity services" in this forbearance petition. Whether or not such services ultimately are determined to be jurisdictionally interstate, the implications for consumers and competition of grant of this petition are potentially far-reaching.

In sum, U S WEST has failed to satisfy the three-part test for forbearance. The Commission should decline its invitation to address piecemeal the important competitive and regulatory issues before the Commission in other proceedings.

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the matter of

Petition of U S WEST Communications,
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a Dominant Carrier in the Phoenix,
Arizona MSA

CC Docket No. 98-157

OPPOSITION OF QWEST COMMUNICATIONS CORPORATION

Qwest Communications Corporation ("Qwest") hereby respectfully submits its opposition to the petition of U S WEST Communications, Inc. ("U S WEST") for forbearance filed on August 24, 1998. U S WEST asks the Commission to forbear from regulating U S WEST as a dominant carrier in the provision of high capacity services in the Phoenix, Arizona, Metropolitan Statistical Area ("MSA"). As we show below, U S WEST has failed to satisfy any of the three-part statutory test for forbearance set forth in Section 10 of the Telecommunications Act of 1996, 47 U.S.C. § 160. The Commission should deny its petition.

INTRODUCTION

Qwest is a multimedia communications company offering a full range of voice, data, video, and information services domestically and internationally. Qwest is close to completing the construction of a \$2.5 billion state-of-the-art, high-capacity, advanced fiber optic telecommunications network across the United States, which will operate at speeds as high as OC-192. Effective June 5, 1998, LCI

International Telecom Corp., one of the nation's fastest growing long distance companies, became a wholly owned subsidiary of Qwest.

Qwest provides a wide range of voice, data, video, and other services over its high-speed network, including domestic and international long distance services, Internet access, IP telephony, web hosting, and web content services.

Qwest also provides services to other common carriers, including traditional voice, IP telephony, ATM and Frame Relay services, and sells dark fiber to other service providers.

Qwest is a customer of U S WEST's high capacity services in the Phoenix area and is also a potential competitor of U S WEST, both for local exchange services and for full service offerings of both conventional and advanced telecommunications services. It therefore has a strong interest in preserving its ability to obtain reasonably priced, nondiscriminatory high capacity last mile services from U S West for both itself and its customers. Continued regulatory oversight of U S WEST's high capacity services is therefore essential.

I. THE EXISTENCE OF SOME COMPETITION FOR HIGH CAPACITY SERVICES DOES NOT JUSTIFY FORBEARANCE.

U S WEST's forbearance request boils down to a claim that because it faces some competition for high capacity offerings, it should be treated as a non-dominant carrier. U S WEST is asking the Commission to ignore the fact that it has a virtual monopoly for all other services, and that with respect to high capacity

services, U S WEST remains the monopoly facilities provider for many customers and for many geographic areas within the Phoenix MSA.

U S WEST relies heavily on the fact that it now faces some measure of competition for its high capacity services in the Phoenix MSA. While it is true that competitors are increasingly able to capture some portion of the high capacity business in Phoenix, and while it is true that much of this traffic is concentrated in certain dense areas in the Phoenix MSA, the fact remains that U S WEST retains a huge advantage in providing high capacity interstate access services because of its ubiquity.

U S WEST itself implicitly acknowledges that large parts of the MSA cannot be served by anyone but U S WEST, by conceding that its competitors cannot provide ubiquitous high capacity services, and that many customers and potential customers remain outside the reach of any competitive service provider. 1/ Its own consultants recognize that many millions of dollars would be required for each competitor to extend its network to serve the remaining portions of U S WEST's high-capacity customer base. 2/

U S WEST also fails to acknowledge that competing in the switched access market requires a competitor to collocate its facilities in U S WEST central

1/ U S WEST acknowledges that no more than about 300 buildings in the Phoenix MSA are currently served by one or more competitors. U S WEST Petition at 14-16.

2/ U S WEST Petition at 5-6.

offices. It has been well-documented in many Commission and state level proceedings that U S WEST and other incumbent local exchange carriers ("ILECs") have created significant impediments to collocation, whether for provision of competitive access services or for provision of competitive local exchange services.

U S WEST also does not acknowledge that the market for high capacity services is likely to expand geographically to include many types of customers that are not currently purchasing high capacity offerings. The vast majority of the purchasers of high capacity interstate access services are interexchange carriers. As the demand grows for high capacity connections, whether for Internet access or other purposes, the demand for high capacity services is likely to expand to include a much more geographically dispersed customer base. There is no evidence in the record here that competitors of U S WEST will have the facilities to provide such competing high capacity services to a broader customer base.

For example, xDSL services could fall into the definition of high capacity services put forward by U S WEST. U S WEST defines "high capacity services" as encompassing anything at a DS-1 speed or higher. This could include many xDSL-based services, including some ADSL offerings. U S WEST has already announced that it will be providing xDSL services to customers in the Phoenix area at well over DS-1 speeds. ^{3/} Other ILECs (for example, GTE and Bell Atlantic)

^{3/} U S West describes its rollout of xDSL services (with speeds up to 7 Mbps) in the Phoenix area in comments filed in response to the Commission's Advanced

have sought to file interstate tariffs for xDSL services. The Commission is currently considering how to resolve the jurisdictional issues raised by these tariff filings. 4/

But regardless of whether U S WEST tariffs its xDSL offerings at the federal or state level, the implications of non-dominant treatment of interstate high capacity offerings should be plain. If U S WEST's petition were granted, these offerings could be exempt from tariffing, from review under the price caps new services test, and from averaging requirements. Without such requirements, the Commission would lose its ability to ensure that these new services, some of which could be offered to consumers and smaller business customers, will be offered on a just, reasonable and nondiscriminatory basis. It also is not clear to what extent there will be competitive alternatives for xDSL services; this subject is only now being explored in the Commission's Section 706 related proceedings. 5/

Services Notice of Inquiry. See Comments of U S WEST filed September 14, 1998, in CC Docket No. 98-146, at 9-11.

4/ There is no need to explore the jurisdictional issues underlying xDSL service offerings here. The point here, rather, is that at this time in the development of high capacity services, the Commission should not relinquish its ability to ensure that, to the extent such offerings are jurisdictionally interstate, there is no discrimination against customer groups and against competitors.

5/ Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, et al., Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, released August 7, 1998 ("Advanced Services Order" and "Advanced Services NPRM" or "NPRM"); Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, FCC 98-187, released August 7, 1998 ("Advanced Services NOI" or "NOI").

U S WEST also asserts that "competitive providers have captured more than 70 percent of the retail market for high capacity services." 6/ Hidden in this number are service providers that simply re-offer or resell the underlying facilities or services provided by U S WEST. In addition, it appears that much of the "resale" involves the provision of a different service to end users, which in turn is dependent on the U S WEST high capacity service as an *input*.

While resellers provide an important competitive spur in many markets, including the high capacity market, their presence does not change the fact that the underlying provider remains the dominant carrier, by virtue of its ubiquitous facilities ownership, and in many cases continues to be the monopoly facilities provider on that particular route. The reseller's offering is shaped by the offering of the underlying carrier, and the reseller's ability to price-compete with the underlying carrier is constrained by the underlying carrier's pricing. Thus, if the underlying carrier engages in discrimination or charges unjust or unreasonable rates, the reseller can do little to correct that situation. 7/

In sum, the factual premise underlying U S WEST's forbearance petition is unfounded. In the next sections, we address the three prongs of the statutory forbearance test.

6/ U S WEST Petition at iii, 19-20.

7/ While resellers can address some types of price discrimination by buying in volume and reselling to smaller customers, their ability to rectify other types of discrimination or to undercut unreasonable underlying prices is limited.

II. REGULATION OF U S WEST'S HIGH CAPACITY SERVICES IS NECESSARY TO ENSURE THAT RATES WILL BE JUST AND REASONABLE AND NOT UNJUSTLY OR UNREASONABLY DISCRIMINATORY.

A. Tariff and Other Regulatory Safeguards are Necessary to Protect Customers from Unreasonable Rates and Discrimination.

U S WEST has asked for forbearance with respect to a number of Commission regulations as applied to its high capacity (DS-1 and above) services. Specifically, it seeks forbearance from the tariff filing requirement, including the fifteen days notice and cost support requirement; the requirement of rate averaging within a study area; and price cap regulation for its access services. 8/ It is important to note, at the outset, that the regulation applied to these services is already minimal. Removal of the remaining protections simply cannot be justified under the three-part statutory test for forbearance set forth in Section 10 of the Act, 47 U.S.C. § 160. We address the first prong of that test in this section. 9/

8/ U S WEST Petition at 35.

9/ The first prong of the test requires the Commission to conclude that

Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulation by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.

47 U.S.C. § 160(a)(1).

First, the tariff filing requirement is necessary to ensure that rates will be just, reasonable and nondiscriminatory. Without a tariff filing requirement, including the notice and cost support requirement, the Commission would be wholly unable to determine whether U S WEST is charging just, reasonable and nondiscriminatory rates for its high capacity services. Without tariffs, customers cannot determine what services are available, cannot determine whether they are being discriminated against, and cannot challenge U S WEST's rates as below cost or otherwise in violation of the Commission's already minimal price cap requirements.

As discussed in more detail in the next section, discrimination in favor of U S WEST itself, its interLATA or information services affiliates, or a preferred customer, would be impossible to detect. Yet such discrimination is not only likely but almost certain to occur. Without tariffs, for example, U S WEST would be able to offer preferential high capacity rates to customers that choose U S WEST over a competitor for local service without detection. In addition, without tariffs, customers such as Qwest, who have had significant difficulties in obtaining access to high bandwidth, last mile services and facilities throughout the country, would be made even worse off. Without tariffs, it would be difficult for Qwest to identify when it has been denied service unreasonably or when it is being provided service at discriminatory rates, terms and conditions vis-à-vis the ILEC itself or its competitors.

U S WEST's request for forbearance on the rate averaging and price caps regulation requirements is similarly unfounded. The Commission's zone density pricing policy already permits U S WEST to deaverage its rates to reflect increased levels of competition it may face in more dense zones. Its request for forbearance on price cap regulation is also unnecessary and unjustifiable. As discussed below, US WEST already has substantial freedom under the price caps scheme to adjust its rates for high capacity service. In fact, U S WEST has unlimited downward flexibility on those rates. The minimal remaining requirements of the Commission's price cap and access charges rules are still necessary to ensure that customers are not subjected to unjust, unreasonable, or unreasonably discriminatory rates.

More fundamentally, the Commission has already carefully addressed pricing flexibility issues on a generic basis in crafting its price caps and access charge rules, and in the pending Access Reform proceeding is considering whether and when increased levels of competition would justify further pricing flexibility. U S WEST should not be permitted to sidestep this process.

The consumer and public interest impact of lifting these requirements is discussed more fully in Sections II and III below.

B. Granting This Request Would Undermine the Commission's Access Reform Efforts and Would Lead to Many More Piecemeal Requests for Deregulation.

In evaluating the U S WEST forbearance request, the Commission must keep in mind that Phoenix and U S WEST are not the only places and carriers

who might be able to advance a similar request for forbearance. Granting this request would open the door to a flood of other requests for forbearance. As discussed further below, the Commission should address how to regulate incumbent local exchange carriers in a changing marketplace through rulemaking, and should adhere to its commitment to address pricing flexibility issues in conjunction with examination of access reform and local competition. The Commission is also examining issues surrounding the provision of high-speed, advanced broadband services in its Section 706 inquiry and rulemaking. ^{10/} All of these issues are inextricably intertwined, and the Commission must not allow a piecemeal forbearance petition to deter it from a careful examination of these issues in other proceedings.

III. COMMISSION REGULATION IS NECESSARY FOR THE PROTECTION OF CONSUMERS.

Under the second prong of the forbearance analysis, it is clear that regulation of U S WEST's high capacity services is necessary to protect consumers. ^{11/} As discussed in the previous section, there are many consumers and many locations in the Phoenix MSA for which a consumer has no choice of high capacity provider. By definition, then, U S WEST remains not only the dominant

^{10/} See n. 8, *supra*.

^{11/} The second prong of the forbearance test requires the Commission to find that "enforcement of such regulation or provision is not necessary for the protection of consumers." 47 U.S.C. § 160(a)(2).

provider, but the monopoly provider, for many customers who are located off a competitor's network.

The potential for discrimination among consumers, in the absence of tariffs and other regulation of dominant carriers, should be obvious. If forbearance were granted, U S WEST would have a license to discriminate by charging higher rates to customers who do not have competitive alternatives and lower prices to those who do have alternatives. U S WEST also can discriminate in favor of itself at the expense of its other carrier-customers, and would be constrained in its ability to do so only by competition from a limited number of carriers in a limited number of locations. 12/

High capacity interstate access services provided to interexchange carriers (who purchase the vast majority of such services today) are an essential input in the product provided to end users purchasing interexchange services. U S WEST, if it were granted forbearance, would have the ability to discriminate in favor of particular interexchange carrier customers, or, more dangerously, in favor of its own interLATA affiliate if and when it qualifies for entry into the interLATA market. Unjust, unreasonable, and discriminatory rates charged to IXC's could affect competition in the interexchange market. End users of interexchange services also could indirectly be affected by unjust, unreasonable and discriminatory

12/ Qwest also would argue that the mere presence of one or two alternative facilities-based providers is not enough to alter the underlying carrier's dominant status, particularly if the alternative providers are also direct competitors of the customers (as is the case for AT&T and MCI/Worldcom).

rates charged by U S WEST for access services. In addition, as discussed in the previous section, if xDSL services were to be considered as interstate "high capacity" services, they could be subject to the potential for discrimination and unjust and unreasonable rates.

U S WEST's request to be permitted to de-average its high capacity rates and to eliminate price cap regulation also has implications for the pricing of high capacity services provided outside the Phoenix MSA. If the lowest priced services are removed from price caps, U S WEST will have a greater ability to raise the prices of high capacity services outside the Phoenix MSA, which remain under price caps and which do not face significant competition. The deaveraging that deregulation would make possible thus could have an unpredictable impact on universal service.

In short, the consumer impacts of deregulation of high capacity services are potentially serious. The Commission would not be justified in forbearing under these circumstances.

IV. FORBEARANCE WOULD BE CONTRARY TO THE PUBLIC INTEREST.

Under the third prong of the forbearance analysis, it is clear that forbearance here would not be consistent with the public interest. 13/

13/ Under the third prong of the test, petitioners requesting forbearance must show that "forbearance from applying such provision or regulation is consistent with the public interest." 47 U.S.C. § 160(a)(3)

First, U S WEST makes much of the fact that it is regulated to a greater degree than other providers of high capacity services in the Phoenix MSA. What U S WEST overlooks is that the regulations imposed under the FCC's current regulatory scheme are minimal. The Commission has already reduced the number of days within which a tariff can take effect to fifteen. The price cap regime is liberal. For example, it allows unlimited downward reductions for the high capacity services currently offered by U S WEST. ^{14/} U S WEST also is permitted under the Commission's rules to de-average its rates through zone density pricing as soon as it has at least one collocator in the study area, and it has taken advantage of this policy. ^{15/} The Commission also has permitted ILECs to offer volume discounts when they reach the point of having 100 cross connects in a central office. ^{16/} Cost support requirements also are minimal under the price cap regime. ^{17/}

The Commission already has considered the extent to which pricing flexibility for special and switched access services is warranted and has identified the circumstances and conditions under which it will extend such pricing flexibility. Although the Commission has, as just described, permitted a measure of pricing flexibility under the current price cap scheme, it also has imposed some limits on

^{14/} Access Charge Reform, Notice of Proposed Rulemaking, and Price Cap Performance Review for Local Exchange Carriers, Third Report and Order, 11 FCC Rcd 21354, ¶ 305 (1996) ("Access NPRM/Price Cap Third Report and Order").

^{15/} See 47 C.F.R. §§ 69.3(e)(7), 69.123.

^{16/} See 47 C.F.R. § 69.112(f).

^{17/} 47 C.F.R. § 61.49(f).

volume and term discounts, customer specific arrangements, and growth-based discounts. 18/

The Commission is currently considering whether to expand the range of access pricing flexibility in its Access Reform proceeding, but has not yet acted on those proposals. 19/ The Commission took a "quid pro quo" approach to pricing flexibility, recognizing the connection between granting additional pricing flexibility and the openness of the local exchange market to competition. The Commission proposed to extend additional pricing flexibility *only* when the necessary steps were taken to open local markets and implement the local competition provisions of the Act. 20/ The Commission also recognized the connection between access competition and local exchange competition, and recognized that problems in access pricing could be addressed in some measure by the expansion of local competition. 21/

U S WEST has not demonstrated yet, and makes no attempt to demonstrate in its petition, that it has satisfied the market-opening requirements of Section 251(c) of the 1996 Act. For the Commission to extend special treatment

18/ Expanded Interconnection with Local Telephone Company Facilities, Remand Order, 9 FCC Rcd 5154, ¶¶ 149-192 (1994); Transport Rate Structure and Pricing, Third Order on Reconsideration, 10 FCC Rcd 3030, ¶¶ 114-115 (1994), aff'd on recon., Fourth Order on Reconsideration, 12 FCC Rcd 12979, ¶ 17 (1995).

19/ See generally Access NPRM/Price Cap Third Report and Order.

20/ Id. at ¶¶ 161-79.

21/ Access Charge Reform, First Report and Order, 12 FCC Rcd 15982, ¶¶ 262-70 (1997).

to a company like U S WEST would reward its failure to comply with the Act with additional pricing flexibility. Grant of forbearance would send a strong message to other ILECs that they need not fully implement the Act, because they can receive targeted pricing flexibility wherever they face a limited measure of competition. Such action would eliminate what few incentives the ILECs have to open the local market.

Furthermore, for all the reasons outlined in Sections I and II of this opposition, U S WEST has not demonstrated that the local market, or even the market for high capacity services, is sufficiently competitive that the deregulation it requests would be consistent with the public interest. The Commission should not leave consumers without any protection in the market for high capacity services, which over time, may not be all that different from the market for telecommunications services generally, as broadband deployment becomes more common.

CONCLUSION

For the reasons given, the Commission should deny U S WEST's petition for forbearance.

Respectfully submitted,

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Counsel for Qwest Communications
Corporation

October 7, 1998

CERTIFICATE OF SERVICE

I, Barbara E. Clocker, hereby certify that on this 7th day of October, 1998, a copy of the Opposition of Qwest Communications Corporation filed in CC Docket No. 98-157 was hand delivered to the parties listed below



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